No. 85-999

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

v.

PHILLIP PARADISE, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, CALIFORNIA, ILLINOIS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, WEST VIRGINIA AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

O. PETER SHERWOOD
Solicitor General
Counsel of Record
LAWRENCE S. KAHN
Deputy Solicitor General

ROBERT ABRAMS
Attorney General of the State of New York
Two World Trade Center
New York, New York 10047

SUZANNE M. LYNN
JON C. DUBIN
ELVIA ROSALES ARRIOLA
Assistant Attorneys General

[Additional List of Counsel on Inside Cover]

JOHN K. VAN DE KAMP
Attorney General of California
350 McAllister Street, Room 6000
San Francisco, California 94102
Telephone: (415) 557-0818

NEIL F. HARTIGAN
Attorney General of Illinois
100 West Randolph Street
Chicago, Illinois 60601

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
2-3-4 Loyola Building, 7th Floor
New Orleans, Louisiana 70112
Telephone: (504) 568-5575

STEPHEN H. SACHS
Attorney General of Maryland
Munsey Building
Calvery and Fayette Streets
Baltimore, Maryland 21202-1909
Telephone: (301) 576-6300

FRANK K. KELLEY
Attorney General of Michigan
525 West Ottawa Street
Lansing, Michigan 48913
Telephone: (517) 373-1110

HUBERT H. HUMPHREY, III
Attorney General of Minnesota
102 State Capitol
St. Paul, Minnesota 55155
Telephone: (612)296-6473

CHARLES G. BROWN
Attorney General of West Virginia
State Capitol
Charleston, West Virginia 25305
Telephone: (304) 348-2021

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin
P.O. Box 7857
Madison, Wisconsin 53707
Telephone: (608) 266-1221

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INTEREST OF AMICI CURIAE

Amici States respectfully submit this brief in support of the respondent. *Amici* urge this court to affirm the judgment of the court below and thus affirm the district courts' broad discretion to fashion or approve necessary and appropriate race-conscious affirmative relief – such as the interim promotion goal challenged herein – in order to redress racial discrimination.

Amici recognize the paramount importance of remedying racial discrimination. Clearly the courts, exercising their responsibility to enforce the Fourteenth Amendment, have played a critical role in bringing about the substantial progress the Nation has made over the last two decades toward overcoming the legacy of slavery. That progress cannot continue unless both courts and governmental bodies retain substantial latitude in devising the means necessary "to eliminate so far as possible the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). *Amici* have an interest in this case both because of their interest in preserving the ability of public employers to develop effective voluntary measures to eliminate the effects of past discrimination on their work forces and their interest in ensuring that federal and state laws forbidding employment discrimination are effectively enforced.

However, while it is essential that courts and other governmental bodies have authority to take strong measures to achieve full compliance with the laws and constitution, remedial measures that adversely affect third parties to a significant extent should not be employed routinely. The court-imposed use of such measures should be reserved for cases involving egregious or longstanding discrimination and even then only where necessary to effect full compliance.

All of the *Amici* have initiated voluntary affirmative action programs to eliminate the effects of past discrimination and

ensure equal opportunity of public employment.[1] More specifically, all of the *Amici* possess state trooper or other state public safety forces and recognize the particularly compelling need for a significant representation of minorities at all levels of public safety employment. *Amici* believe that integrated state public safety forces are necessary in order to curtail racially-motivated improprieties, lessen racial tension, and greatly increase respect for the law and cooperation with law enforcement officials.

Many of the *Amici* have state enforcement agencies charged with the responsibility of enforcing state anti-discrimination laws.[2] *Amici* also have a strong interest in preserving these agencies' latitude to fashion appropriate race-conscious affirmative relief for the redress of discriminatory violations under state law.

The State of New York, by Robert Abrams, Attorney General of the State of New York, and other *Amici* submit this brief pursuant to Supreme Court Rule 36.4.

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[1] *See*, N.Y. Exec. Law § 296(12) (McKinney 1985), N.Y. Exec. Orders Nos. 6 and 21, reported in 8A Fair Emp. Prac. Man. (BNA) 455:3071-72; Cal. Gov't Code §§ 19400-19406, 19790-19798 (West 1980), Cal. Exec. Orders Nos. B-85-81 and D-20-83, reported in 8A Fair Emp. Prac. Man (BNA) 453:853; Ill. Ann. Stat. ch. 68, §§ 2-105 and 7-105 (Smith-Hurd Supp. 1985); LA. Exec. Order No. 13, Louisiana Register Vol. I, p. 7 (September 25, 1972); MD. Exec. Order dated December 9, 1970 (Code of Maryland Register 01.01.1976.05) reported in 8A Fair Emp. Prac. Man. (BNA) 455:655; Mich. Comp. Laws Ann. § 37.2210 (West Supp. 1985), Mich. Exec. Order 1985-2; Minn. Stat. Ann. §§ 43A.19, 43A.191 (West Supp. 1986); W. Va. Exec. Order 16-78, reported in 8A Fair Emp. Prac. Man. (BNA) 457:3026; Wis. Stat. Ann. §§ 16.765 and 230.01 *et seq.* (West Supp. 1985), Wis. Exec. Orders Nos. 9, 26 and 28, reported in 8A Fair Emp. Prac. Man. (BNA) 457:3217-3218.

[2] *See*, N.Y. Exec. Law § 290 *et seq.* (McKinney 1985) (establishing authority of the New York State Division of Human Rights); Cal. Gov't Code Sec. 12900 *et seq.* (West 1980) (establishing authority of the California Fair Employment and Housing Commission); Ill. Rev. Stat. ch. 68, ¶¶ 7-101, 8-101 *et seq.* (1985) (establishing authority of the Illinois Department of Human Rights and Illinois Human Rights Commission); MD. Code Ann. Art. 49B (West 1979) (establishing authority of the Maryland Human Relations Commission); Mich. Const. Art. V, § 29, Mich. Comp. Laws Ann. § 37.2101 *et seq.* (West Supp. 1985)

(Footnote continued)

SUMMARY OF ARGUMENT

This Court has already held that courts may employ race-conscious measures in order to remedy unconstitutional racial discrimination in employment. The Court has closely scrutinized the use of remedial race-conscious measures and has recognized that the need to remedy unconstitutional discrimination is a sufficiently compelling governmental purpose to justify such measures. Similarly, under certain circumstances, a state's interest in establishing a representative workforce which can better provide effective law enforcement or other critical governmental services may constitute a compelling government interest that is sufficient to justify use of race-conscious measures in employment.

Nevertheless, the Court has cautioned that while the district court is not required to order the least restrictive remedy, care should be taken to avoid unnecessarily trammelling the rights of third persons who might be adversely affected.

In this case the district court was presented with a longstanding pattern of racial exclusion and a conspicuous failure of the defendant to take needed steps to end its unconstitutional practices and cure their effects. Under these circumstances, the district court acted well within the scope of its authority when it ordered the defendants to promote blacks on a one-to-one basis until they develop job-related promotional procedures without an adverse impact. Its action was appropriate because it was necessary to effect compliance, was flexible in that it did not require promotion of unnecessary or unqualified officers, was of limited duration for it remained in effect for only one round of promotions, did not unduly burden non-minorities — only eight (8) corporal positions were filled by blacks as a result of the court's order — and the long term goal established by the order was related to the representation of blacks in the appropriate labor market.

(establishing authority of the Michigan Civil Rights Commission); Minn. Rules Part 5000.340 *et seq.* (1985) (establishing authority of the Minnesota Department of Human Rights); W. Va. Code §§ 5-11-1 *et seq.* (1985) (establishing authority of the West Virginia Human Rights Commission); Wisc. Stat. Ann. §§ 111.31-111.395 (West Supp. 1985) (establishing authority of the Wisconsin State Equal Rights Division and Labor Industry Review Commission).

ARGUMENT

I. THE DISTRICT COURT'S IMPOSITION OF AN INTERIM PROMOTION GOAL IN ACCORDANCE WITH NEGOTIATED CONSENT DECREES WAS FULLY AUTHORIZED BY AND CONSISTENT WITH THE EQUAL PROTECTION COMPONENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS

A. Introduction

This case must be viewed against the background of the longstanding and pervasive history of purposeful racial discrimination practiced by the Alabama Department of Public Safety (herein "DPS") since its creation. Until ordered in 1972 to cease its unconstitutional practices, it simply refused to employ blacks in any sworn position. *See NAACP v. Allen*, 340 F. Supp 703 (M.D. Ala. 1972). After its employment practices were found to violate the equal protection clause of the Fourteenth Amendment, it embarked on a program of resistance which prompted the district court to hold that "the defendants' ha[d] for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of new troopers hired." J.A. at 33-34.[3] The district court also found that an unusually high attrition rate among black troopers was the result of the "selection of other than the best qualified blacks from the eligibility rosters, social and official discrimination against blacks at the trooper training academy, preferential treatment of whites in some aspects of training and testing and discipline of blacks harsher than that given whites for similar misconduct while on the force." J.A. at 34.

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[3] J.A. denotes reference to the Joint Appendix of the parties filed with the Court.

B. *The Appropriate Constitutional Standard Of Review Of Affirmative Action Remedies Recognizes The Broad Discretion Accorded Courts and Governmental Bodies To Choose The Means Necessary To Accomplish Compelling Governmental Purposes.*

This Court has already held that the constitution permits government, including the courts, to use race-conscious affirmative measures as one means for achieving the paramount national objective of eradicating racial discrimination and its vestiges. *Local 28 of the Sheet Metal Workers v. E.E.O.C.*, ____*U.S.*____, *106 S. Ct. 3019 (1986); Wygant v. Jackson Board of Education*, ____U.S.____, 106 S. Ct. 1842 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). This Court has subjected the affirmative action plans it has reviewed to searching inquiry, recognizing both the importance of the rights involved and the potential for misuse of racial classifications.

Four members of the Court apply a flexible standard for evaluating the remedial use of race and would uphold the plan if it serves " 'important government objectives' and is 'substantially related to achievement of those objectives.' " *Id.*; *Regents of the University of California v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, J. joined by White, Marshall and Blackmun, JJ.); *id.* at 387 (White, J.).[4] These Justices reason that because no fundamental right is involved and because whites have none of the immutable characteristics of a suspect class, "conventional" strict scrutiny is inapplicable. *Wygant*, 106 S.Ct. at 1861 (Citing *Bakke*, 438 U.S. at 357.).

Nevertheless, these Justices eschew the least rigorous "rational basis" standard of review recognizing that "any racial classification is subject to misuse", *Wygant*, 106 S.Ct. at 1861, since such

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[4] Justice Stevens also declines to apply conventional strict scrutiny in reviewing affirmative action remedies, instead focusing on the validity of the race-consciousness, the fairness of the procedures used to adopt and implement the race-conscious action and the nature of the harm to non-minorities. *Wygant*, 106 S.Ct. at 1869 (Stevens, J., dissenting).

classifications can be "inexcusably utilized to stereotype and stigmatize politically powerless segments of society." *Bakke*, 438 U.S. at 359 (citing *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (dissenting opinion)). Thus, review under the Fourteenth Amendment, should be "strict and searching" but not "strict in theory and fatal in fact." *Wygant*, 106 S.Ct. at 1861 (citing *Bakke*, 438 U.S. at 362).

Four members of the Court apply strict scrutiny in this context, reasoning that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant*, 106 S.Ct. at 1846 (Powell J., joined by Burger C. J. and Rehnquist J.); *id.* at 1853 (O'Connor, J. concurring) (adopting Justice Powell's formulation); *see also Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J. concurring); *Bakke*, 438 U.S. at 287-307 (Powell, J.). These members of the Court apply a more restrictive formulation of the standards than Justices Brennan, White, Marshall and Blackmun. "There are two prongs to this examination. First, any racial classification 'must be justified by a compelling governmental interest.' Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.' " *Id.* (Citations omitted).

As Justice O'Connor has observed, the disparities among the tests "do not preclude a fair measure of consensus." *Wygant*, 106 S.Ct. at 1853 (O'Connor, J.). "In particular, as regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a 'compelling' and an 'important' government purpose may be a negligible one." *Id.*

Similarly, in evaluating the means chosen to accomplish the compelling governmental purpose, Justice Powell, author of each of the Court's strict scrutiny affirmative action opinions, has echoed the concern of Justices Brennan, White, Marshall and Blackmun that the Court's review not be "strict in theory but fatal in fact." *Fullilove*, 448 U.S. at 507 (Powell, J.). Rather, he has recognized the particularly proximate position of the trial courts and hence the necessity of according them broad

discretion to fashion or approve appropriate affirmative relief for the redress of racial discrimination. *See* below at 15.[5]

Thus as a practical matter the differences between the various "means" tests are not substantial. A majority of the Court accords broad discretion to the district court or governmental body[6] to develop a remedy once a compelling purpose is identified subject only to a limiting "core principle" that such a remedy "not impose disproportionate harm on the interests, or unnecessarily trammel the rights of innocent individuals directly and adversely affected by a plan's racial preference." *Wygant*, 106 S.Ct. at 1853-54 (O'Connor, J.). Because selection of an interim promotion goal here is justified by several compelling governmental purposes and falls well within the permissible range of the district court's discretion, the decision below should be affirmed.

C. The Interim Goal Is Justified By Several Compelling Governmental Interests

1. Remedying Prior Discrimination And Barring Like Discrimination In The Future

It is undisputed that the need to prevent racial discrimination and remedy its effects — a national policy of the "highest priority",

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[5] This Court has long observed this principle in other contexts. As stated by Justice Jackson:

> The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to the exigencies of the particular case.

International Salt Co. v. United States, 332 U.S. 392, 400 (1947) (footnote and citations omitted).

[6] In *Fullilove*, Justice Powell also observed that as with the latitude accorded the trial courts, "Congress possesses a similar degree of discretion to choose a suitable remedy for the redress of racial discrimination." 448 U.S. at 508 (Powell, J.); *see generally*, Note, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies*, 67 Va. L. Rev. 1235 (1981).

Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976) — is a constitutionally sufficient predicate for both court-imposed and voluntary affirmative action measures. *See Local 28 Sheet Metal Workers*, 106 S.Ct. at 3053 (Brennan, J., joined by Marshall, Blackmun and Stevens, JJ.); *id.* at 3055 (Powell, J.); *Wygant*, 106 S.Ct. at 1847 (Powell, J., joined by Burger, C.J., and Rehnquist, J.); *id.* at 1854 (O'Connor); *id.* at 1866 (Marshall, J. joined by Brennan and Blackmun JJ.).

The numerous opinions in this case reveal a pattern of longstanding and egregious discrimination affecting all levels of the department and creating barriers to black entry, retention and advancement.[7] As a result in late 1983, nearly twelve years after the DPS had been ordered to cease its unconstitutional discriminatory practices and to take remedial action, it had no blacks in the ranks of major, captain, lieutenant or sergeant but had an aggregate of 131 whites in those ranks. Only four of the 66 corporal positions were occupied by blacks. *Paradise v. Prescott*, 585 F. Supp. 72, 74 (M.D. Ala. 1983). The district court also found that the department sought to frustrate or delay full compliance with its remedial orders. Its non-compliance included a failure to develop job related promotion procedures which did not adversely impact on black candidates. *Paradise v. Prescott*, 580 F. Supp. 171, 173 (M.D. Ala. 1983). Under these circumstances, the district court's selection of an interim promotion goal pursuant to negotiated consent decrees was unquestionably justified by a compelling purpose.

2. *State Governments' Operational Need For Integrated Public Safety Services*

In 1974, the court of appeals recognized in this case the governmental need for an integrated public safety force as an additional

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[7] *See e.g., United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, *NAACP v. Allen*, 493 F.2d 623 (5th Cir. 1974); *NAACP v. Dothard*, 373 F. Supp. 504 (M.D. Ala. 1974); *Paradise v. Shoemaker*, 470 F. Supp. 439 (M.D. Ala. 1979); *Paradise v. Prescott*, 580 F. Supp. 171 (M.D. Ala. 1983); *Paradise v. Prescott*, 585 F. Supp 72 (M.D. Ala. 1983), *aff'd*, *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985).

purpose served through the imposition of race-conscious goals. It held:

> Finally, but perhaps the most crucial consideration in our view is that this is not a private employer and not simply an exercise in providing minorities with equal opportunity employment. This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement.

NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974) (quoting *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333, 1341 (2d Cir. 1973)). Thus, just as the "state interest in the promotion of racial diversity has been found sufficiently 'compelling' at least in the context of higher education, to support the use of racial considerations in furthering that interest" *Wygant*, 106 S.Ct. at 1853 (O'Connor, J.), "sound governmental decision making" might in certain circumstances, mandate the conclusion that "an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers." *Id.* at 1867-68 (Stevens, J.).

The compelling operational need for representative minority employment by state and local public safety departments "is not simply that blacks communicate better with blacks" but:

> Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers but on the public's perception of law enforcement officials and institutions.

Detroit Police Officer's Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (quoted with

approval by the First Circuit in *Boston Chapter NAACP v. Beecher*, 679 F.2d 965, 977 (1st Cir. 1981), *vacated as moot sub nom., Boston Firefighters Union, Local 718 v. Boston Chapter NAACP*, 461 U.S. 477 (1983) and the Fourth Circuit in *Talbert v. Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 145 (1982)).

The plain reality of this important public purpose in state and local public safety departments has been identified repeatedly by the federal courts as a compelling justification for the use of race-conscious employment remedies.[8] However, recognition of the close correlation between the effective delivery of public safety services and the employment of appropriate numbers of minority public safety officers is not merely a judicial observation nor a recognition of recent vintage. Rather, as summarized by the Sixth Circuit:

> It is based on law enforcement experience and a number of studies conducted at the highest levels. *E.g.*, National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973); National Commission on the Causes and Prevention of Violence, Final Report: *To Establish Justice, To Insure Domestic Tranquility* (1969); Report of the National Advisory Commission on Civil Disorders (1968); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967). As these

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[8] *See e.g. Williams v. Vukovich*, 720 F.2d 909, 923-24 (6th Cir. 1983); *Baker v. City of Detroit*, 483 F. Supp. 930, 996-1000 (E.D. Mich. 1979), *aff'd sub nom., Bratton v. City of Detroit*, 704 F.2d 876 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 977-78 (1st Cir. 1982), *vacated as moot sub nom., Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 145 (1982); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); *Doores v. McNamara*, 476 F. Supp. 887, 995 (W.D. Mo. 1979); *League of United Latin American Citizens v. City of Santa Ana*, 410 F. Supp. 873, 896-97 (C.D. Cal. 1976).

> reports emphasize, the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact. *See, To Establish Justice, supra* at 145; *Report on Civil Disorders, supra* at 145; *Report on Civil Disorders, supra* at 300 (New York Times edition). It is critical to effective law enforcement that police receive public cooperation and support. *Report on Civil Disorders, supra* at 301; *Task Force Report: The Police, supra* at 144-45, 167; *Police, supra* at 830.
>
> These national commissions recommended the recruitment of additional numbers of minority police officers as a means of improving community support and law enforcement effectiveness. In fact, the benefits of Negro officers were recognized as early as 1931 by the "Wickersham Commission." *Report on the Causes of Crime* 24., National Commission on Law Observance and Enforcement (Vol. I, 1931).

Detroit Police Officers' Ass'n, 608 F.2d at 695.

In addition to these empirical studies, both the Congress and the Federal Law Enforcement Assistance Administration (LEAA) recognize the importance of taking measures to integrate public safety services. In commenting on amendments to extend Title VII coverage to state and local governments the Senate Report observed that:

> The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in the particular community but also creates mistrust, alienation and all too often hostility towards the entire process of government.

S. Rep. 92-415, 92nd Cong., 1st Sess. 10 (1971) (cited with approval in *Wygant*, 106 S.Ct. at 1855 (O'Connor, J.)). The House Report specifically noted that:

> The problem of employment discrimination is particularly acute and has the most deleterious effect in

> those government activities which are most visible to the minority communities (notably education, law enforcement and the administration of justice) with the result that the credibility of the government's claim to represent all the people is negated.

H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 17 (1971).

The LEAA has similarly concluded "that the full and equal participation of ... minority individuals in employment opportunities in the criminal justice system is a necessary component to the Safe Streets Act's program to reduce crime and delinquency in the United States." 28 C.F.R. § 42.301 (1982). LEAA regulations require that where a "recipient has previously discriminated against persons on the ground of race ... [or] color ..., the recipient must take affirmative action to overcome the effects of prior discrimination." 28 C.F.R. § 42.203(i)(1) (1982).

Finally, this critical state public safety concern is not limited to a need for integrated entry-level personnel. As the Sixth Circuit also explained:

> This need extends to the higher ranks in police departments, such as the rank of sergeant involved in this case:
>
> > If minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policy-making and other crucial decisions.

Detroit Police Officers' Ass'n, 608 F.2d at 695. (Citing *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police* (1967) at 172). *See also Williams v. Vukovich*, 720 F.2d at 923 (finding a "particularly" great need for integration of the "supervisory ranks"); *Talbert v. Richmond*, 648 F.2d at 923 (finding a "legitimate interest" in the integration of the "top ranks"); *Baker v. City of Detroit*, 483 F. Supp. at 998-1000 (rejecting the claim that the City's operational needs

extended only to black patrolmen and concluding that "[t]he importance of black *lieutenants* in reducing discriminatory practices cannot be overstated.") (Emphasis added). Accordingly, the district court's employment of an interim promotion goal pursuant to the negotiated consent decrees served the compelling operational need for integrated state public safety services.

3. *Compliance With Federal Court Decrees*

In *Local 28 Sheet Metal Workers*, Justice Powell found that in addition to serving the governmental interest in eradicating racial discrimination, some remedial measures there were independently justified by a compelling "societal interest in compliance with the judgments of federal courts." 106 S.Ct. at 3055 (Powell, J.). This interest is implicated here as well.

From the early 1970's onward the defendants have engaged in a pattern of recalcitrance or complacency in the face of the district court's orders and decrees necessitating several separate requests for supplemental relief by the plaintiffs. In 1975 the district court made an explicit finding that the defendants purposefully flouted the district court's 1972 order[9] by artificially restricting the size of the trooper force, using selection methods that arbitrarily excluded large numbers of black applicants and using racially discriminatory practices to create high black attrition from the force.

More specifically, the court fashioned the interim promotion goal challenged here in response to the defendants' complete failure to comply with the 1979 and 1981 consent decrees requiring the development of a promotion procedure which did not adversely impact on black candidates.

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[9] The 1972 order, in turn, as it pertained to supporting personnel, was required due to the defendants' inability to comply with the 1970 order in *United States v. Frazer*. *See NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972).

D. The Interim Promotion Goal Fell Well Within The Permissible Range of the District Court's Discretion.

The proper constitutional standard of review of race-conscious remedies recognizes the broad discretion accorded district courts to choose or approve the means necessary to accomplish compelling governmental purposes. Where that purpose is remedying racial discrimination this Court has long recognized that the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

Similarly, this Court has observed that where unconstitutional race discrimination is involved, the district court must remedy both "the condition that offends the constitution," *Swann v. Charlotte-Mecklenburg Board of Education (Swann I)*, 402 U.S. 1, 15-16 (1971), as well as the conditions found to "flow from such a violation." *Milliken v. Bradley*, 433 U.S. 267, 282 (1977). The court must take steps to eliminate "all vestiges" of the discrimination "root and branch." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 200 and n.11 (1973). The remedy must be "feasible", "workable" and "effective", *Swann I*, 402 U.S. at 32, and "promise realistically to work" and "to work now." *Green v. County School Board*, 391 U.S. 430, 439 (1968).

Moreover, "once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann I*, 402 U.S. at 15. In addition, "all reasonable methods [must] be available to formulate a decree." *North Carolina State Board of Education v. Swann (Swann II)*, 402 U.S. 43, 46 (1971).

Thus, the courts of appeals have often deferred to the district courts' broad remedial discretion in sustaining the propriety of race-conscious measures. As explained by the Third Circuit in upholding an interim hiring goal:

> [P]reservation of the court's flexibility in the framing of remedies would seem to be particularly important in racial discrimination cases since they often require the district court to tailor its order to meet the needs of a highly complex and emotionally charged factual situation.

Erie Human Relations Commission v. Tullio, 493 F.2d 371, 374 (3d Cir. 1974). Similarly, the Fourth Circuit noted that "this broad discretion is mandated by the highly individual nature of the relief needed to remedy discrimination in each particular case." *Chisholm v. United States Postal Service*, 665 F.2d 482, 498-99 (4th Cir. 1981). Thus, the Ninth and Second Circuits have concluded that remedial goals are not "limited to any specific or prescribed form" and can include "specific numbers or ratios" because "[t]he precise method of remedying past discrimination is largely left to the broad discretion of the district judge." *Davis v. County of Los Angeles*, 566 F.2d 1334, 1343 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979) (quoting *Rios v. Enterprise Ass'n. Steamfitters Local 638 of U.A.*, 501 F.2d 622, 631 (2d Cir. 1974)).

Furthermore, contrary to the petitioner's suggestion, the district court need not experiment with a shopping list of alternative measures before resorting to remedial goals. *See* Sol. Gen. br. at 18-21. As Justice Powell explained, when reviewing district court use of race-conscious measures "this court has not required remedial plans to be limited to the least restrictive means of implementation." *Fullilove*, 448 U.S. at 508. (Powell, J.) Moreover, Justice Powell has observed that the district court "having had the parties before it over a period of time [is] in the best position to judge whether an alternative remedy ... would have been effective." *Local 28 Sheet Metal Workers*, 106 S. Ct. at 3056 (Powell, J.).

The district court must have an array of tools available to it to enable it to provide effective remedies that are suitable to the circumstances with which it is presented. Authority to order interim promotion goals is one such tool. Surely it is not appropriate to use that tool in every case. In fact, the lower courts have ordered the use of hiring and promotion goals or ratios sparingly. *See* Brief

of The Lawyers' Committee for Civil Rights Under Law filed in No. 84-1999, *Local Number 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, at p. 7. To assess whether or not a particular race-conscious remedy is appropriate for use in a given case, the Court has examined a variety of factors. Those include: (1) necessity; (2) flexibility; (3) duration; (4) burden on non-minorities and (5) relationship to the relevant minority labor market or population. *See Local 28 Sheet Metal Workers*, 106 S. Ct. at 3051-3053 (Brennan, J. joined by Marshall, Blackmun and Stevens JJ.); *id* at 3055 (Powell, J.); *id.* at 3060-3062 (O'Connor, J.); *id* at 3062 (White, J.); *Wygant*, 106 S. Ct. at 1850-52 (Powell, J. joined by Burger C.J. and Rehnquist, J.); *id.* at 1857 (O'Connor).

As we show below, the interim promotion goal ordered here falls well within the permissible range of the district court's authority under the facts of this case, and the judgment below must therefore be affirmed.

1. Necessity

Evaluation of the necessity of race-conscious relief requires consideration of the purpose served by the remedy, the scope and extent of the defendants' discriminatory practices and their effects and the efficacy of alternative remedies and their relative burdens.[*] *See Local 28 Sheet Metal Workers*, 106 S. Ct. at 3051; *id.* at 3055 (Powell, J.). All of these considerations support the propriety of the interim promotion goal.

The district court charged with the responsibility of developing a promotion procedure pursuant to the consent decrees was well aware of the defendants' "long term, open and pervasive" discrimination, the resulting virtual exclusion of blacks from the DPS's upper ranks and the failure of all remedies other than interim and long term hiring goals in providing any significant degree of progress in remedying this discrimination at the lower

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[*] Consideration of the efficacy of alternative remedies does not require the district court to impose the least restrictive remedy. *Compare Local 28 Sheet Metal Workers*, at 3055 (Powell, J.) *with Fullilove*, 448 U.S. at 508 (Powell, J.).

levels of the force. *Paradise v. Prescott*, 585 F. Supp. at 75-76.[8] Indeed, in drafting the promotion goal, the district court specifically relied on an earlier order in which its review of this case's history "demonstrated dramatically" the efficacy of race-conscious measures over other relief. *Id.* at n.3. (citing *NAACP v. Dothard*, 373 F. Supp. 504 (M.D. Ala. 1974)).

In the *Dothard* opinion, the district court had compared, as to the hiring of clerical personnel, the virtual "non-existent" progress of non-goal measures in *Frazer* with the significant progress achieved through the hiring goals in *Allen* and concluded that without goals "effective relief will not be achieved." *Id.* at 507. These observations spurred the Fifth Circuit's commendation of the "unusual confirmation of the feasibility, wisdom and efficacy of the decree." *NAACP v. Allen*, 493 F.2d at 621. Accordingly, the district court's conclusion that the "egregious" imbalances in the DPS's upper ranks would not "dissipate within the near future" without race-conscious action, 585 F. Supp. at 75, cannot seriously be questioned.

Apart from its stated remedial purpose, the district court also sought to encourage the DPS's prompt development of a non-discriminatory promotion procedure to avert the disparate consequences of other selection methods. *See id.* Under these circumstances, the use of interim promotion goals is plainly appropriate. As explained by the plurality in *Local 28 Sheet Metal Workers*:

> [A] district court may find it necessary to order interim hiring or promotion goals pending development of non-discriminatory hiring or promotion procedures. In these cases, the use of numerical goals provide a compromise

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[8] In construing a consent order for enforcement purposes, this Court has required that the district court look to "the circumstances surrounding the order and the context in which the parties were operating." *United States v. I.T.T. Continental Baking Co.*, 420 U.S. 223, 243 (1975).

> between two unacceptable alternatives: an outright ban on hiring or promotions or continued use of a discriminatory selection procedure.

106 S. Ct. at 3037 (Brennan J., joined by Marshall, Blackmun and Stevens, JJ.).

Finally, the petitioner viewing the interim promotion goal solely as an "*in terrorem*" enforcement device and ignoring its other purposes, suggests that the district court should have chosen other remedies. Sol. Gen. br. at 19-21. For example, petitioner asserts that the court could have made promotion decisions itself, appointed a trustee to supervise the DPS's progress or imposed heavy fines and fees. Sol. Gen. br. at 21.

Even viewing the interim promotion goal in the limited manner suggested by petitioner, the alternative remedies offered are neither equally effective nor less burdensome. Since use of the interim promotion goal compelled within seven months, *see* J.A. at 142-145, what the DPS had been unwilling to do in close to five years, it is difficult to imagine how the other suggested approaches could have been as effective. Moreover, the petitioner's suggested remedies fail to take into account the burdens on the "interests of state and local authorities in managing their own affairs", *Milliken v. Bradley*, 433 U.S. 267, 281 (1977), and the express congressional recognition in section 706(g) of Title VII of the propriety of leaving the details of individual employment decisions to employers notwithstanding the use of class-based race-conscious measures. *See Local 28 Sheet Metal Workers*, 106 S. Ct. at 3035, (Brennan, J. joined by Marshall, Blackmun and Stevens, JJ.); *id.* at 3059-60 (O'Connor, J.) ("[A]s to any racial goal ordered by a court as a remedy for past discrimination, the employer *always* has a potential defense by virtue of § 706(g) against a claim that it was required to hire an employee that the employee was not hired for reasons unrelated to discrimination.") (Emphasis in original).[a]

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[a] Attorneys fees and costs have been awarded on numerous occasions in this case and have not produced any noticeable effect on the DPS's black supervisory composition. *See e.g.*, 317 F. Supp. at 1093; 340 F. Supp. at 708-10.

2. *Flexibility*

The interim promotion goal is flexible. It neither requires nor permits the promotion of unqualified persons. Moreover, the goal does not require hiring unneeded employees or displacing existing employees. *Local 28 Sheet Metal Workers*, 106 S. Ct. at 3061 (O'Connor, J.); *id.* at 3062-63 (White, J.).

Thus, it accommodates legitimate reasons for non-compliance, such as the lack of qualified applicants or declining economic conditions, and it does not impose sanctions on the employer despite good faith efforts to comply. *Compare id.* at 3051 (Brennan, J. joined by Marshall, Blackmun and Stevens, JJ.) *and id.* at 3056 (Powell, J.) *with id.* at 3061-62 (O'Connor, J) *and id.* at 3062-63 (White, J.). Accordingly, even evaluated under the strictest standards of flexibility utilized by some members of the Court in the more limited context of a court's Title VII remedial authority, the goal has none of the attributes of a rigid quota. *See id.* at 3060-62 (O'Connor, J), *id.* 3062-63 (White, J.).

3. *Duration*

The interim promotion goal is temporary both in letter and application. As drafted, the interim goal applied only until either a non-discriminatory promotion procedure was developed or until 25% of each of the higher ranks were comprised of black officers. In application, it was only used once — at the corporal level — and it resulted in the promotions of only eight black troopers. *See Paradise v. Prescott*, 767 F.2d at 1524. Accordingly, the interim goal has operated as a limited and "temporary tool for remedying past discrimination without attempting to 'maintain' a previously achieved balance." *Local 28 Sheet Metal Workers*, 106 S. Ct. at 3052 (Brennan, J., joined by Marshall, Blackmun and Stevens, JJ.); *see also, id.* at 3056 (Powell, J.).

4. *Burden on Non-Minorities*

"[A]s part of this nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some

of the burden of the remedy." *Wygant*, 106 S. Ct. at 1852 (Powell, J., joined by Burger, C.J. and Rehnquist, J.). Members of this Court have repeatedly recognized that "such a sharing of the burden is not impermissible." *Id.*; *Fullilove*, 448 U.S. at 484 (Burger C.J., joined by White and Powell, JJ.); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 777 (1976). Because the "actual burden [if any] shouldered by non-minoriti[es] ... is relatively light", *Fullilove*, 448 U.S. at 484, and "will have only a marginal impact on the interests of white workers" *Local 28 Sheet Metal Workers*, 106 S. Ct. at 3054, the interim promotion goal is plainly appropriate.

First, as discussed above, the temporary and extremely limited nature of the goal substantially restricts its potential burden. It has been used only once, only for corporal promotions and only eight black officers received promotions as a result of its operation.[13]

Second, the interim goal is not an "absolute bar to white advancement." See *Local 28 Sheet Metal Workers*, 106 S. Ct. at 3052; *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979). Even in the one instance where the interim goal was employed, half of those promoted were white.

Third, the interim goal does not require the discharge of white employees. *See Local 28 Sheet Metal Workers*, 106 S. Ct. at 3057 (Powell, J.); *Weber*, 443 U.S. at 208. It merely delays promotions to persons who otherwise would have received them if the DPS's discriminatory selection process had been followed strictly. As explained by Justice Powell, "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job." *Wygant*, 106 S. Ct. at 1851. Whereas layoffs might in certain circumstances "impose the entire burden of achieving racial equality on particular individuals resulting in serious disruption of their lives" *id.*, promotion goals, like hiring goals, "impose only a diffuse

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[13] Because of its narrow scope and limited application, the interim goal does not present the prospect of widespread "leap frogging [of] minorities over senior and better qualified whites." *See Local 93 International Firefighters, 106 S. Ct. at 3082 (White , J., dissenting).*

burden, often foreclosing only one of several opportunities." *See id.* Thus, unlike the permanent debilitating disruption of a layoff, white candidates denied promotion by the extremely limited application of the interim goal, may simply reapply for future positions.

Fourth, any actual burden on non-minority expectations must be tempered by recognition that such expectations have been artificially inflated by the blatant discriminatory practices which the lower courts here have condemned. Thus, just as "some non-minority business may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities", *Fullilove*, 448 U.S. at 484-85 (Burger, C.J. joined by White and Powell, JJ.), "where an employer has violated an anti-discrimination law, the expectations of non-minority workers are themselves products of discrimination and hence 'tainted' and therefore more easily upset." *Bakke*, 438 U.S. at 365 (Brennan, J., joined by White, Marshall and Blackmun, JJ.).

Presumably, many white promotional candidates have reaped some competitive benefits from the DPS's pre and post 1972 discriminatory practices, and the continuing frustration of the district court's order leading to the 1975 order, the 1979 and 1981 consent decrees and the 1983 enforcement proceedings. Indeed, at the time of the enforcement proceedings leading to the 1983 order at issue here, virtually all promotions to the rank of corporal had been awarded to white officers and no white officers had ever had to compete with a black candidate for a promotion. As observed by the district court "the department *still* operate[d] an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons." 585 F. Supp. at 74. (Emphasis in original).

Finally, the intervenors' individual claims of entitlement based on higher standing on the eligibility ranking J.A. at 67-85 — as with the identical claims of white trooper applicants rejected 12 years ago — are neither novel nor persuasive. As the Fifth Circuit explained in 1974:

> [N]o applicant for public employment can base any claim of right under the Fourteenth Amendment's

> equal protection or due process clauses upon an eligibility ranking which results from unvalidated selection procedures that have been shown to disqualify blacks at a disproportionate rate. This is so because by definition such criteria have not been shown to be predictive of successful job performance. Hence there is no reliable way to know that any accepted applicant is truly better qualified than others who have been rejected.

493 F.2d at 618.

Accordingly, in light of its minimal burden on non-minority interests and expectations, the interim promotion goal neither "impose[d] disproportionate harm on the interests, [n]or unnecessarily trammel[led] the rights of innocent individuals" *Wygant*, 106 S. Ct. at 1853-54 (O'Connor, J.), and thus withstands constitutional scrutiny.

5. Relationship to Relevant Minority Labor Market

The remedy selected by the district court pursuant to the consent decrees contains both a long term or end goal and an entrance or interim goal. *See generally United States v. City of Buffalo*, 633 F.2d 643, 647 (2d Cir. 1980). The long term or end goal is 25% and reflects the relevant black population.[14] The interim goal of promoting one black for each white promoted merely measures the speed of progress towards the end goal, much in the manner of an end date. *Cf. Local 28 Sheet Metal Workers*, 106 S. Ct. at 3056 (Powell, J.).[15] Plainly, regulation of the speed

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[14] Although the intervenors now question the propriety and correctness of the 25% labor market end goal, IV Br. at 13-14, this issue was neither raised below nor in the petition for certiorari and is thus not properly before this Court. *See Adickes v. Kress*, 398 U.S. 144, 147 n.2 (1969) (The Court will "not ordinarily consider" issues neither raised nor considered before the court of appeals); *Irvine v. California*, 347 U.S. 128, 129-30 (1953) (The Court should not consider additional questions not raised in the petition for certiorari).

[15] As with the end date in *Local 28 Sheet Metal Workers*, there is no reason to assume that the interim goal will be applied inflexibly if invoked in the future. *See* 106 S. Ct. at 3051 (Brennan, J. joined by Marshall, Blackmun and Stevens, JJ.); *id* at 3056 (Powell, J.). Moreover, as discussed above at 19, the interim goal is crafted in a particularly flexible manner.

of remedial measures is a matter appropriately committed to the sound discretion of the district court which is best aware of the surrounding circumstances and the parties' history. Indeed, this Court as well as numerous courts of appeals have recognized the discretionary nature of the choice of interim or entrance goals and have approved interim goals which exceed the labor market end goal or percentage, *see e.g. Weber*, 443 U.S. at 199 (50% interim goal, 39% labor market end goal); *United States v. City of Buffalo*, 633 F.2d at 646-47 (50% interim goal, 22% labor market percentage), those which equal the end goal, *see e.g. Bratton*, 704 F.2d at 893-97 (50% interim goal, 50% labor market end goal) and those which are exceeded by labor market percentages, *see e.g. Vulcan Society of New York City Fire Dept. Inc. v. Civil Service Comm'n*, 490 F.2d 387, 398-99 (2d Cir. 1973) (25% interim goal, 32% labor market percentage).[18]

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[18] Here, the district court exercised its discretion wisely as to the first fifteen corporal openings, considering both a lesser one-shot proposal to promote four blacks and eleven whites, J.A. at 125-26, and the possibility of greater measures such as promoting blacks to all fifteen positions followed by the one-to-one promotion goal "[i]n light of the department's failure after almost twelve years to eradicate the continuing effects of its own discrimination and to develop acceptable promotion procedures and in light of the severity of the existing racial imbalances" 585 F. Supp. at 75 n.1. The court wisely arrived at an intermediate figure directing the promotion of eight blacks and eight whites pursuant to the interim procedure. *See* 767 F.2d at 1524.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

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September 30, 1986

Respectfully submitted,

O. PETER SHERWOOD
Solicitor General
Counsel of Record
LAWRENCE S. KAHN
Deputy Solicitor General

ROBERT ABRAMS
Attorney General of the
State of New York
Two World Trade Center
New York, New York 10047

SUZANNE M. LYNN
JON C. DUBIN
ELVIA ROSALES ARRIOLA
Assistant Attorneys General